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IN THE

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**Supreme Court of the United States**

OCTOBER TERM, 1945

No. 357

FLUSHINGSIDE REALTY &  
CONSTRUCTION CO.,

*Petitioner,*

*against*

COMMISSIONER OF INTERNAL REVENUE,  
*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT AND BRIEF  
IN SUPPORT OF PETITION**

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ROSWELL MAGILL  
GEORGE G. TYLER  
*Counsel for the Petitioner,*  
15 Broad Street,  
New York 5, N. Y.

August 15, 1945.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

*To the Honorable, the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

Your petitioner, Flushingside Realty & Construction Co., respectfully prays that a writ of certiorari issue to review an order, judgment and decree of the United States Circuit Court of Appeals for the Second Circuit, entered on May 23, 1945 (R. 89), affirming in part and reversing in part an order and decision of The Tax Court of the United States entered on September 9, 1943 (R. 45-6). A certified transcript of the record is furnished herewith in accordance with Rule 38, Par. 1, of the Rules of this Court.

The opinion of the Tax Court (R. 14-38) is unreported. The opinion of the Circuit Court of Appeals (R. 85-88) is reported at 149 F. (2d) 572.

## STATEMENT

The issues raised by this petition are the same as those discussed in the accompanying petition and brief of Winter Realty & Construction Co.

Prior to 1932, the City of New York took by condemnation proceedings certain property owned by the petitioner (R. 18) which had a tax basis of \$81,889.28. During the years 1932, 1935 and 1936, the City paid to the petitioner the respective net amounts of \$84,942.25, \$15,462.87 and \$90,657.84, aggregating \$191,062.96, as compensation (exclusive of interest) for the property taken (R. 18, 34). Gain upon such awards was accordingly realized as follows (R. 18):

1932	\$ 3,052.97
1935	15,462.87
1936	90,657.84

As in the Winter Realty case, prior to the end of 1932, the petitioner made an application for permission to establish a replacement fund which was received but apparently lost (R. 20). After making several inquiries about the first application, the petitioner made a second application to establish a replacement fund in 1937 (R. 21). Neither of such applications was ever acted on by the Commissioner of Internal Revenue.

Upon receipt of payment in each of the years 1932, 1935, and 1936, the petitioner (just as in the Winter Realty case) had forthwith entered the full net amount in a "replacement fund" which appeared on the liability side of the ledger (R. 21).

Furthermore, the petitioner forthwith invested \$71,750 of the awards in real estate mortgages (R. 25, 34).

### **The Statute**

The applicable statute is § 112(f) of the Revenue Acts of 1932, 1934 and 1936 (47 Stat. 169, 48 Stat. 860, and 49 Stat. 1648, respectively). Such section and the Treasury Regulations promulgated pursuant thereto are set forth in the accompanying petition filed by Winter Realty & Construction Co.

### **The Commissioner's Determination**

The Commissioner determined that no part of the awards were expended forthwith in the acquisition of other property similar or related in service or use to the property condemned or in the establishment of a replacement fund (R. 23). He accordingly determined that the entire amount of the capital gain realized for each of the years 1932, 1935 and 1936 was taxable to the petitioner.

### **The Decision of the Tax Court**

The Tax Court decided the case as if the petitioner had obtained "permission to establish a replacement fund" under the Treasury Regulations (R. 33). (The statute does not require such permission). The Tax Court held, however, (against the petitioner) that no replacement fund was established, mainly upon the ground that a large part of the award money was invested in real estate mortgages, which would probably not be regarded as an ideal investment for the purpose of a replacement fund (R. 34). The petitioner appealed from that portion of the Tax Court's decision.

The Tax Court also found that the petitioner forthwith expended \$85,801.02 of the award money "in the acqui-

tion of other property similar or related in service or use to the property so converted", \$45,143.18 being thus expended in 1932 and \$40,657.84 with respect to 1936 (R. 26).\*

The Tax Court further held (in favor of the petitioner) that, since the capital gain from the condemnation awards was realized in each of the years of the payment of the awards, namely, 1932, 1935 and 1936, the award received in each year should be traced to see what amount was expended in the acquisition of similar property and that amount was to be applied in determining the amount of gain realized in that year. It held against the Commissioner's contention that the three years should be treated as a unit for the purpose of computing that part of the realized gain which was taxable (R. 40-44). The Commissioner appealed from that portion of the Tax Court's decision.

### **The Decision of the Circuit Court of Appeals**

As in the Winter Realty case, upon the petitioner's appeal, the Circuit Court of Appeals inferentially disapproved the main ground of the Tax Court's decision, namely, that real estate mortgages were not a proper investment for a replacement fund. The Circuit Court of Appeals held, however, that the replacement fund set up by the petitioner was not within the statute and the Treasury Regulations *solely* because the Commissioner of Internal Revenue had not given permission to establish the fund.

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\*The Circuit Court of Appeals reversed the Tax Court as to \$18,471.23 (\$40,657.84 less \$22,186.61, the bank balance at the end of 1936) of the \$40,657.84 found to have been thus expended with respect to 1936.



As in the Winter Realty case, upon the Commissioner's appeal, the Circuit Court of Appeals held that the Tax Court was wrong in the rule of tax accounting which it had used in determining how the amount of the award expended in the purchase of similar property should be applied against the realized gain. In so doing, the Court not only reversed the Tax Court on the question of proper tax accounting, but overruled a previous decision of its own which supported the Tax Court's view (*Wilmore Steamship Co., Inc. v. Commissioner*, 78 F. (2d) 667.)

### **JURISDICTION**

Jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 USC § 348(a)). The date of the order, judgment and decree of the Circuit Court of Appeals for the Second Circuit to be reviewed is May 23, 1945 (R. 89).

### **QUESTIONS PRESENTED**

The questions presented are the same as those presented in the accompanying petition of Winter Realty & Construction Co., to which this Court is respectfully referred.

### **REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT**

The reasons relied on for allowance of the writ of certiorari are the same as those presented in the accompanying petition of Winter Realty & Construction Co., to which this Court is respectfully referred.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of

this Court, directed to the United States Circuit Court of Appeals for the Second Judicial Circuit, sitting at New York, New York, commanding said Court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court; that the order, judgment and decree of the Circuit Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may seem proper.

FLUSHINGSIDE REALTY &  
CONSTRUCTION Co.,  
*Petitioner,*

By

ROSWELL MAGILL

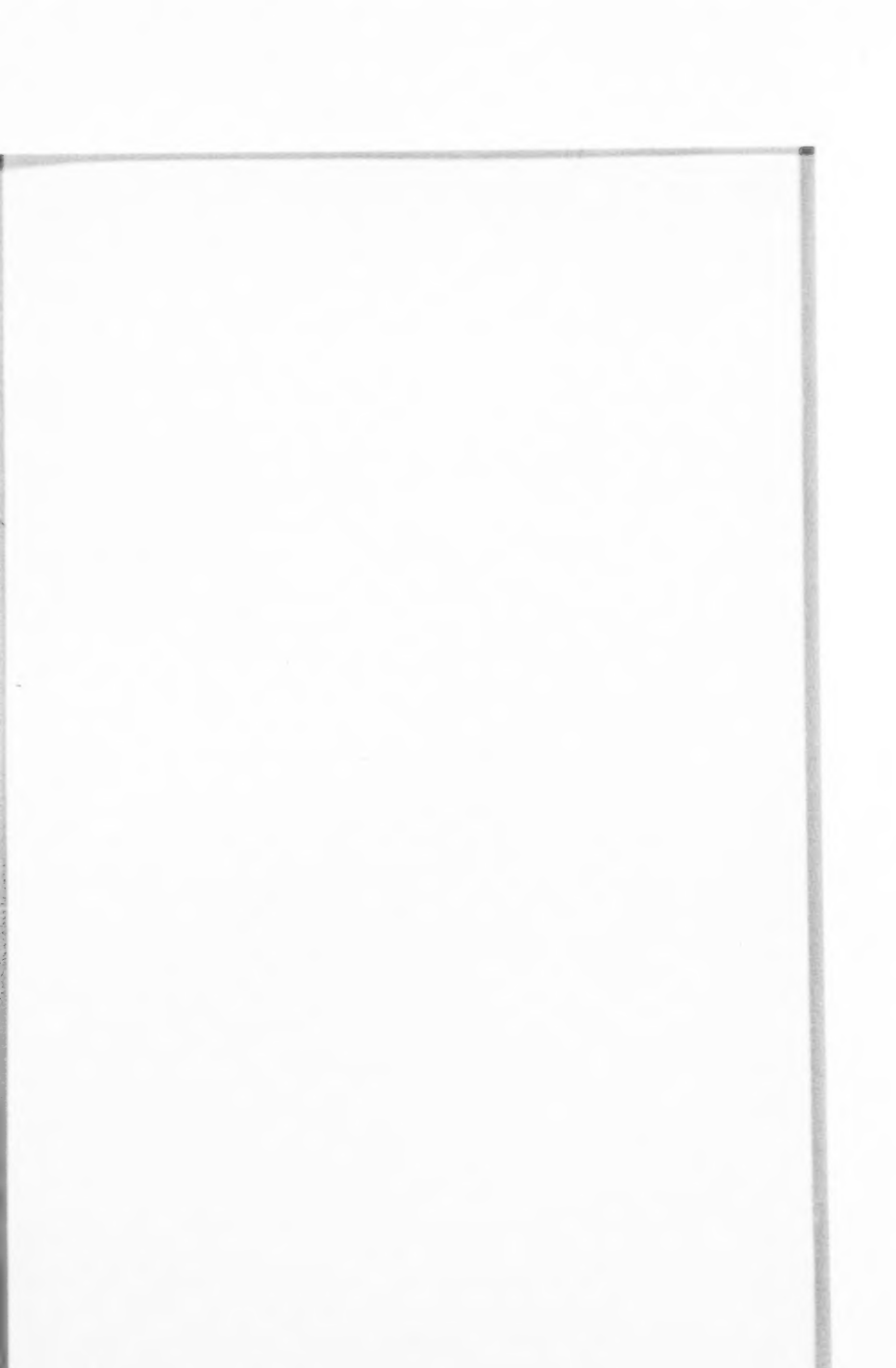
GEORGE G. TYLER

*Counsel for the Petitioner*

15 Broad Street

New York 5, N. Y.

August 15, 1945.



# **PETITIONER'S BRIEF**

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**BRIEF IN SUPPORT OF PETITION**

Since the same issues are raised by this petition as are raised by the accompanying petition of Winter Realty & Construction Co., the Court is respectfully referred to the brief in support of that petition.

Respectfully submitted,

ROSWELL MAGILL  
GEORGE G. TYLER  
*Counsel for the Petitioner,*  
15 Broad Street,  
New York 5, N. Y.

August 15, 1945.